No. 667, Brief for Pl'ff
Brief of Lionberger for Pl'ff in Error

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BRIEF FOR PLAINTIFF IN ERROR.

Filed Dec. 30, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO.,
PLAINTIFF IN ERROR,
vs.
MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS.
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IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF AND ARGUMENT OF
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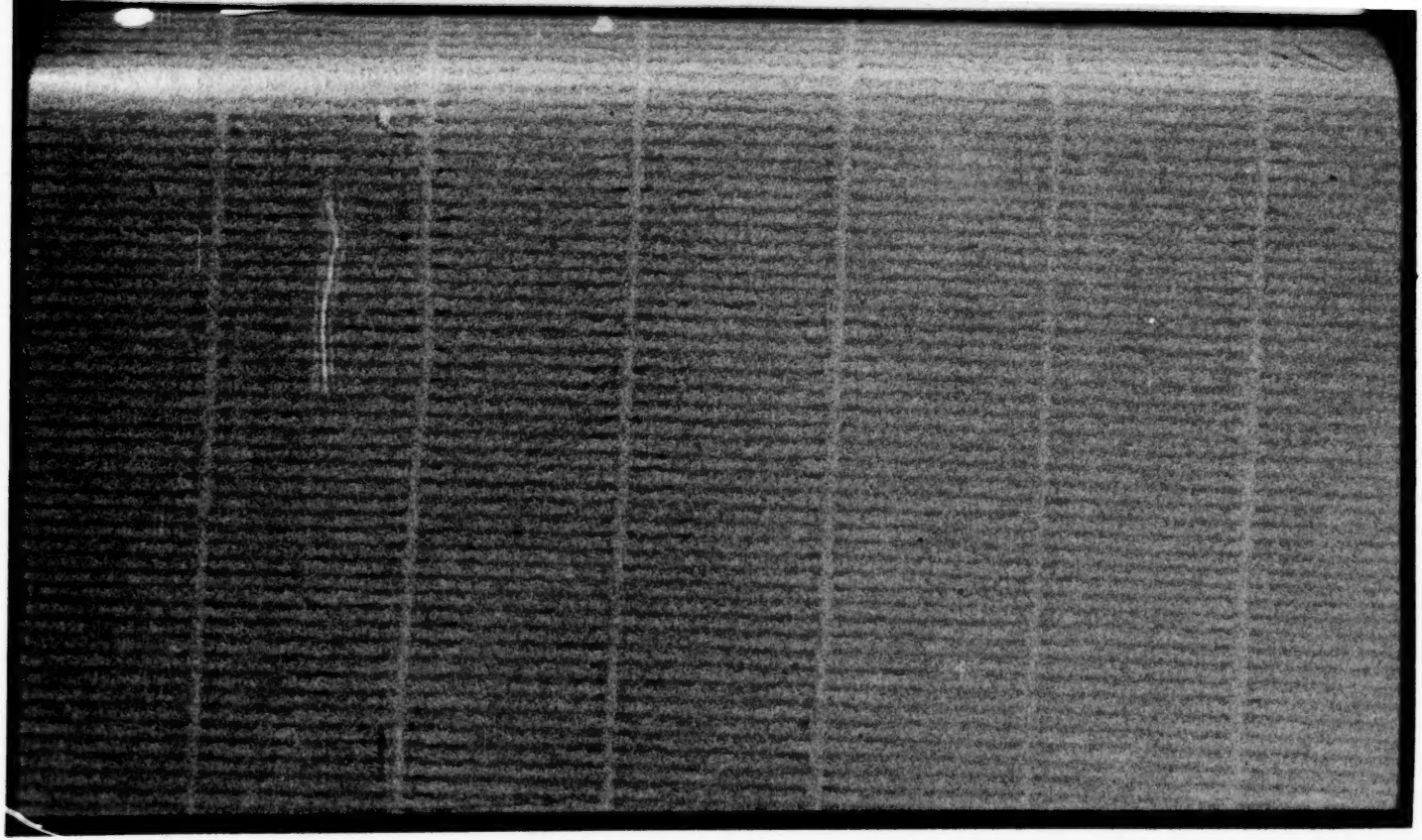

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STATEMENT.

Petition. The plaintiff in error avers that it is a corporation organized and existing under certain acts of the legislature of Missouri, which constitute its charter; that by said charter it is authorized and empowered to light the city of St. Louis forever, and to make and vend gas, gas-lights and gas-fixtures, and any substance or material that

may now or hereafter be used as a substitute therefor, throughout the limits of the city of St. Louis; and to that end to establish and lay down in any portion of the corporate limits of said city all pipes, fixtures, or other thing properly required in order to do the same, and to have all other powers necessary to execute and carry out the privileges and powers granted.

That plaintiff proposes to lay down in a part of Broadway, a street of said city, wires for the transmission of electricity to be used for furnishing electric light to said city and its inhabitants; and that the defendants in error, the City of St. Louis and its Street Commissioner, refuse to allow said street to be excavated for such purpose (Trans., pg. 4).

Return. The defendants in error deny the corporate existence of the plaintiff and allege that its corporate powers and privileges ceased March 2, 1887. They also deny that the charter of plaintiff conferred upon it the right to vend electricity, and affirm that electricity is not a substance or material within the meaning of said charter.

They aver further that the Revised Ordinances of the city of St. Louis, as amended by Ordinance 16,897, prohibit the placing of wires, tubes or cables conveying electricity for the production of light, heat or power, along or across any of the streets of St. Louis, by any person who has not accepted and complied with the provisions of said Revised Ordinances, or been authorized so to do by the Municipal Assembly; and that plaintiff has neither accepted or complied with said Revised Ordinances, nor been authorized to lay wires by the Municipal Assembly (Trans., pg. 24).

Answer. The answer of plaintiff to the return of defendants avers that electricity is a substance or material within

the meaning of the charter, and the use of it for lighting was well known to art when the plaintiff's charter was granted; but whether such be the fact or not is immaterial because electric lights, being carbon filaments or pencils rendered incandescent by electric currents, are substances and materials in as true a sense as carbon in gas, made incandescent by combustion.

Plaintiff further avers and shows that the Ordinance of St. Louis relied on by defendants impairs the obligation of plaintiff's contract with the State in the following particulars, and is therefore in conflict with section 10 of article 1 of the constitution of the United States.

First. It prohibits the plaintiff from doing what its charter says it may do, unless the consent of the Municipal Assembly be first obtained; and the Municipal Assembly of St. Louis refuses such consent.

Second. The ordinance prohibits plaintiff from doing what its charter says it may do, unless plaintiff will agree in writing to pay and pay five per centum of its gross receipts into the city treasury (Trans., pg. 46).

Demurrer. The defendants demur to the answer on the ground that its allegations do not entitle the plaintiff to the relief prayed for (Trans., pg. 58.)

Decision. The Supreme Court of Missouri, while assuming for the purposes of its decision that the charter of plaintiff is a valid and subsisting contract with the State, and that the legislature of the State had, when the contract was made, supreme control over the streets of St. Louis, decides that the charter of the city adopted in 1875 pursuant to the constitution of the State, confers upon the city the power to regulate the use of its streets; that an ordinance which wholly prohibits the laying of wires under ground is a valid exercise of the police power conferred

upon the city; and that since it appears from the record that plaintiff is now suffered to maintain an overhead system of poles and wires, such ordinance does not impair the obligation of its contract with the State. The opinion also intimates that plaintiff's charter, properly construed, does not confer upon it the right to vend electricity (Trans., pg. 37).

Questions. The questions now presented for consideration are as follows:—

1. Has this Court jurisdiction to review the decision of the Supreme Court of Missouri?

2. Are the acts which constitute the charter of plaintiff valid enactments?

3. Does such charter confer upon the plaintiff the right to furnish light to the city of St. Louis and its inhabitants by means of electricity, and for that purpose to lay down in the streets of said city pipes or conduits for the conveyance of wires?

4. Does the ordinance of the city, relied upon by the defendants, impair the plaintiff's contract with the State?

ASSIGNMENT OF ERRORS.

The Supreme Court erred in overruling relator's demurrer to respondent's return.

And the said court erred in overruling relator's motion to strike out portions of respondent's return.

And the said court erred in sustaining respondent's demurrer to relator's traverse and reply to respondent's return.

And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of mandamus prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the city of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and that it was

bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing light by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

BRIEF.

I.

This court has jurisdiction to review the record and decision below. The plaintiff in error asserts certain charter privileges. The validity and effect of the charter, and the validity of a subsequent law which impairs the obligation of the charter, are directly drawn in question. The decision of the court below was in favor of the validity of the ordinance. *Post*, pg. 9.

Sec. 10, Art. 1 of the United States;
Sec. 709, of the Rev. Stats. of the U. S.;
Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S. 486.

II.

The acts creating the plaintiff corporation are valid enactments. They do not violate Sec. I, of Article VIII, of the constitution of Missouri, 1865. *Post*, pg. 23.

Session Acts, Mo., 1857, p. 598;
" " 1857–8, p. 599;
" " 1868, p. 187;
St. Louis *v.* Gas Co., 70 Mo. 118;
Gas Co. *v.* St. Louis, 86 Mo. 499;
State *v.* Laclede Gas Co., 102 Mo. 483;
R. R. Co. *v.* Shambaugh, 106 Mo. 568.

Neither do they violate Section 25 of Article IV, of said constitution. *Post*, pg. 26.

Cases above, and

Boonville *v.* Trigg, 46 Mo. 289;
State *v.* Draper, 47 Mo. 33;
State *v.* Miller, 100 Mo. 446;
State *v.* Bennet, 102 Mo. 356.

III.

Said acts are now in full force, and entitle the plaintiff to "have, hold, exercise and enjoy" the rights thereby conferred.

State *v.* Laclede Gas Co, 102 Mo. 483. *Post*, pg. 30.

IV.

Among the privileges conferred is the right to light the city of St. Louis, and to make and vend

> "gas, gas lights and gas fixtures and any substance or material that may now or hereafter be used as a substitute therefor; and to that end to establish and lay down in any portion of the corporate limits of St. Louis any pipe, fixture or thing necessary or proper to do the same."

Sec. 5, Act Mch. 2, 1857, as amended by Sec. 1 of the Act of Mch. 26, 1868. *Post*, pg. 36.

V.

The ordinance of 1887, as amended by Ordinance 16,894, is void because—

First. It delegates to the Board of Public Improvements the regulation of the use of the streets of St. Louis by electric companies, whereas the charter of the city provides

that the "Mayor and Municipal Assembly shall by ordinance regulate the use of the streets." *Post*, pg. 43.

Par. 2, Sec. 26, Art. 3 of the City Charter;
II Rev. Stats. of Missouri 1889, p. 2096;
Ruggles *v.* Colliers, 43 Mo. 353;
St. Louis *v.* Clemens, 43 Mo. 395
St. Louis *v.* Buckner, 44 Mo. 19;
St. Louis *v.* Clemens, 52 Mo. 133;
Haegela *v.* Mallinckrodt, 46 Mo. 577;
Saline Co. *v.* Wilson, 61 Mo. 237;
Thompson *v.* Boonville, 61 Mo. 282;
Matthews *v.* Alexandria, 68 Mo. 115;
St. Louis *v.* Russell, 116 Mo. 248;
St. Louis *v.* Howard, 119 Mo. 41;
St. Joseph *v.* Wilshire, 47 Mo. App. 145;
King Co. *v.* Hamilton, 51 Mo. App. 120;
O'Neil *v.* Ins. Co., 166 Pa. 72;
Anderson *v.* Ins. Co., 28 L. R. A. 609.

Second. It exacts from the plaintiff a tax of five per cent upon its gross receipts, and to that extent impairs the obligation of its contract with the State.

State *v.* Laclede Gas Co., 102 Mo. 483;
Rushville *v.* Gas Co., 15 L. R. A. 321. *Post*, pg. 49.

Third. It wholly prohibits the exercise by plaintiff of the powers and privileges conferred by its charter, and thereby impairs the obligation of said contract.

Sec. 10 of Art. I of the Const of the U. S. *Post*, pg. 54.

VI.

Section 35 of Article IV. of the Charter of St. Louis charges upon the Street Commissioner of said city the duty

of repairing, etc., the streets, and the ordinances of the city provide that no person shall make an excavation in the streets without a permit from said Commissioner.

II Rev. Stats. Mo. 1889, p. 2109;
Rev. Ords. St. Louis, 1892, Sec. 1335. *Post*, pg. 55.

VII.

The Street Commissioner refuses a permit, and mandamus is the proper remedy.

State *v.* Laclede Gas Co., 102 Mo. 472;
State *v.* Weeks, 93 Mo. 449;
State *v.* May, 106 Mo. 488. *Post*, pg. 56.

ARGUMENT.

I.

JURISDICTION OF THIS COURT.

With respect to the jurisdiction of this Court to consider and determine the questions presented by the record, there can be no doubt. Sec. 10 of Article I. of the constitution of the United States declares that "No State shall pass a law impairing the obligation of a contract." Section 709 of the Revised Statutes of the United States allows a writ of error from this Court for the review of a final judgment or decree of the Supreme Court of a State where is drawn in question the validity of a statute of, or authority exercised under the State, on the ground of their being repugnant to the constitution of the United States, and the decision is in favor of their validity. This Court has recently and repeatedly decided

1. "This Court has appellate power to revise the judgment of the Supreme Court of a State whenever such court shall adjudge that not to be a contract which has been alleged, in the form of legal proceedings, by a litigant, to be one within the meaning of that clause of the constitution of the United States which inhibits the States from passing laws impairing the obligation of contracts."

2. "When the State court upholds the subsequent law on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right; because, if it did, the subsequent law cannot be upheld."

3. "When the existence and construction of a contract are undisputed, and the State court upholds a

subsequent law on the ground that it does not impair the obligation of the admitted contract, this Court has jurisdiction."

Mobile & O. R. R. Co. *v.* Tenn., 153 U. S. 486 (1894).

In the present case the plaintiff in error alleges that the State made with it a contract whereby the right to lay in the streets of St. Louis "any pipe, fixture or thing" that might be necessary or proper to enable it to light said city and "make and vend gas, gaslights and gasfixtures, or any substance or material that might at any time be used as a substitute therefor" was perpetually conferred; that the city thereafter passed an ordinance which wholly prohibits the plaintiff from laying in one or any of its streets any pipe or fixture for the purpose of enabling it to vend, by underground conduits, electric lights.

The validity of the subsequent ordinance is directly drawn in question. The Supreme Court of Missouri decided in favor of its validity. This Court has undoubted jurisdiction to decide whether such contract exists or not; what is its proper construction; and whether said ordinance impairs the rights thereby conferred; — and this it will do independently of the local tribunal.

II.

VALIDITY OF PLAINTIFF'S CHARTER.

The charter of plaintiff in error is derived from the following three acts of the legislature of Missouri: —

An Act to incorporate "The Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows: —

§ 1. James M. Hughes, Edward Bredell, Robert Holmes,

John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary, said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors, and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An Act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making

and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent added thereto, such value to be fixed by two appraisers, one to be chosen by he city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20; of article first of the act entitled, "An Act concerning Corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An Act supplementary and amendatory of an act entitled "An Act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An Act to amend an act to incorporate The Laclede Gas Light Company, approved March 2, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows: —

Section 1. The said Laclede gaslight company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed

as affecting the vested rights of the St. Louis gaslight company; and the sixth section of the said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede gaslight company, approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Approved March 26th, 1868. (Trans., pgs. 5, 6, 7.)

The constitutionality of the act of 1868 by which the rights now asserted are conferred, is attacked upon the ground that said act violates Sec. 1 of Art. VIII., and Sec. 25 of Art. IV. of the constitution of 1865. These sections and the objections of defendants are hereinafter fully set forth. At the outset we deem it proper to call the attention of the Court to the circumstances under which the plaintiff was incorporated, the objects for which its charter was granted, and the constructions which have heretofore been put upon the acts of the legislature by the local tribunals. The facts stated will be found established by the record, the session acts, or the reported decisions of the Supreme Court of Missouri.

St. Louis Gas Light Co. A corporation known as the St. Louis Gas Light Company was incorporated by a special act of the legislature in the year 1837. Its charter, as amended, conferred upon it "the sole and exclusive right and privilege of manufacturing and vending gas within the City of St. Louis and its suburbs" until January 1, 1890 (Trans., pg. 47).

Session Acts Mo. 1837, p. 133;
Session Acts of Mo. 1839, p. 142;
City of St. Louis *v.* Gas Co., 70 Mo. 118 (1879);
Gas Co. *v.* St. Louis, 86 Mo. 499 (1885).

Laclede Gas Light Co. The Laclede Gas Light Company, plaintiff in error, was incorporated by an act approved March 2, 1857. The act in terms conferred upon the company the "sole and exclusive privilege of manufacturing and vending gas, etc," until March 2, 1887, in all that part of the then limits of St. Louis, which were not embraced within the boundaries established for the city by an act of February 8, 1839, and in the event that the city did not purchase the works of the company, until March 2, 1917. The city boundaries established by said act were Seventh street on the west, and Biddle street on the north (Acts 1839, p. 142; Acts 1857, p. 598).

Predicament of Laclede Co. The plaintiff was duly organized, within the meaning of the act of 1857, but the effect of that part of the charter theretofore granted to the St. Louis Gas Light Company, which conferred upon said company the sole and exclusive privilege of making and vending gas within the city of St. Louis and its suburbs until January 1, 1890, was to prevent plaintiff from doing business until that time, without the consent of the St. Louis Company. It was so decided by the Supreme Court of Missouri in the case of the City of St. Louis *v.* St. Louis Gas Light Company, 70 Mo. 120 (1879).

> "The St. Louis Gas Light Company had by virtue of its charter the right to exclude the Laclede Gas Light Company from making and vending gas within the city. * * * It may therefore be implied that it was the purpose of the legislature that the Laclede Company might obtain, if it could, from the St. Louis Company, a waiver or abandonment of its right to exclude competition."

In the year 1868, the Laclede Company had not obtained from the St. Louis Company a waiver of its exclusive privileges. Eleven years of its life had elapsed, but during that

time it had been disabled from carrying on the business for which it was created. Its charter would expire in 1887, if the city should in the meantime elect to purchase its plant. The exclusive privileges of the St. Louis Company obtained until January 1, 1890 (Trans., pg. 47–48).

Act of 1868. Under such circumstances, the legislature of the State passed the act of March 26, 1868, entitled "An Act to amend an Act to incorporate the Laclede Gas Light Company." Its first section declared that the company

> "May within the corporate limits of the city of St. Louis *as the same are now or may hereafter be established*, exercise, have, hold and enjoy *forever* all the rights, privileges, etc., granted to it by the fifth section" of the original charter.

The second section authorized the company to increase its stock to such an amount as might be necessary to carry on its business. The third section prevented any invasion of the exclusive privileges of the St. Louis Gas Light Company, and repealed that section of the original charter (act of 1857) which authorized the city of St. Louis to purchase the property of the Laclede Company, and which provided that if the city did not purchase, the company might exist until 1917 (*ante*, pp. 11 and 12).

The effects of this amendment were far-reaching. While it expressly suspends the exercise of the rights conferred until the expiration of the exclusive privileges of the St. Louis Company, it confers them forever, and authorizes them to be exercised throughout the limits of the city as then or thereafter established. It deprives the city of its right to purchase the property of the company. It authorizes the stock of the company to be increased from time to time to any amount that might be necessary to carry on its business.

Tripartite Agreement. After the passage of this act of 1868, an instrument known as the Tripartite Agreement was made and executed by the city of St. Louis, the St. Louis Gas Light Company and the Laclede Gas Light Company (Trans., pg. 7).

The considerations moving to the various parties were of very great value. The St. Louis Company thereby released forever all claims of exclusive privilege within any part of the city, and transferred to the Laclede Company all of its pipes, mains, etc., north of the south line of Washington avenue. The Laclede Company paid to the St. Louis Company a large sum of money for such concessions, and bound itself to furnish gas within the ceded territory for the time specified. It also released forever to the city all claims of exclusive privilege. The city for the considerations aforesaid, surrendered its right to purchase the property of the St. Louis Company and contracted to pay the two companies, for gas furnished by them respectively, a stated price.

City *v.* Gas Co., 70 Mo. 118.

For the purposes of the present suit, the significant parts of this agreement are those which relate to the territory to be occupied by the Laclede Company, and the term of the contract. It will be remembered that the act of 1857, the original charter of the company, did not authorize it to vend gas *south* of Biddle street nor *east* of seventh, nor after March 2, 1887, except in a certain event (*ante*, p. 11).

The Tripartite Agreement required the Laclede Company to vend gas in all that part of the city which lay *south* of Biddle street, *north* of Washington avenue and *east* of Seventh street until January 1, 1890. It had power to do this *only* under the act of 1868.

Suit of City v. *Gas Co.* Some time after the Tripartite

Agreement went into effect, the city of St. Louis brought a suit against the St. Louisand the Laclede Companies to avoid that agreement and get possession of the property of the St. Louis Company. In this suit it was urged, among other things, that the agreement was void because the Laclede Gas Light Company had no power to execute it. The Circuit Court of St. Louis so decided, but upon appeal to the Supreme Court of the State its decision was reversed. The effect of this judgment of the Supreme Court was not only to remove all doubt with respect to the validity of the Tripartite Agreement, but to establish the validity of the Act of 1868, because, by said act only, was the Laclede company authorized to do business in the territory and for the term specified in the agreement. St. Louis *v.* St. L. Gas Light Co., 70 Mo. 118 (1879).

Suit of Gas Co. v. *City.* In a subsequent case, wherein the St. Louis Gas Light Company sought to enforce the provisions of the Tripartite Agreement, it was again urged by the city that said agreement was void on the ground that it must bind all parties or none, and that it did not bind the Laclede Gas Light Company because such company was not authorized to make such a contract. The Supreme Court of Missouri then said, affirming its previous judgment:—

> "It is assumed, not decided, that the first branch of the proposition is correct, but the second is not true in point of fact or law. The 6th section of the act of March 2, 1857, incorporating the Laclede Gas Light Company gave to it and the city the power to make any contract they deemed best with regard to lighting a *portion* of the city, and to the city the right to purchase the property of the company at the expiration of twenty years. This section, it is true, *was repealed by the act of March 2, 1868*, and hence the conclusion contended for is drawn. But by the 5th section of the

act of 1857 that company had power within a *defined district* to light the same, to make and vend gas and gaslights, and to lay down pipes therein and have all other powers necessary to carry out the privileges and powers thereby granted.

"*All of these rights, privileges and franchises are by the act of 1868, extended over the corporate limits of the city.*" Gas Co. *v.* St. Louis, 86 Mo. 499, 500 (1885).

Suit of City v. *Laclede Co.* In addition to the foregoing cases there is a third, wherein the validity of said Act of 1868 was controverted, and was again established by the Supreme Court of Missouri.

Prior to January 1, 1890, the date of the expiration of the franchises of the St. Louis Gas Light Company, that company procured from the city of St. Louis a franchise whereby *it, its successors and assigns* might, for a period beginning January 1, 1890, and ending January 1, 1920, make and vend gas within the limits of the city at not more than $1.25 per thousand cubic feet.

On the 31st of December, 1889, this franchise was sold at public auction by the trustees of the St. Louis Company, and purchased by the Laclede Company. Thereafter the city of St. Louis passed what is known as the *90 cents gas* ordinance, which prohibited the Laclede Company from charging for gas more than ninety cents per thousand cubic feet. The company refused to comply with the ordinance and thereupon a suit was begun to compel compliance by mandamus.

Two defenses were set up by the company: first, that the ordinance impaired the franchise purchased from the St. Louis Company, and second, that it impaired the obligation of the company's charter. The Supreme Court of the State sustained both defenses. With respect to the charter of the company, the Court said: —

"III. The third point at issue, as already stated, presents the question whether the charter of the respondent company, granted by the State, contains such features of a contractual nature as forbid and prevent any imterference therewith either by the State government or by any municipality representing the authority of that government. The respondent company exists by virtue of a special charter granted March 2, 1857, as amended by an act approved March 26, 1868." * * *

"The fifth section of the original act incorporating the respondent gave it ample powers of contracting with the city for making and vending gas, etc., etc., and the amendatory act made its franchises co-extensive with the boundaries of the city. This point was inferentially thus ruled in City of St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, and thus ruled directly in a later case" (86 Mo. 499).

State *v.* Laclede GasLight Co., 102 Mo. 483 (1890).

Upon three occasions, therefore, has the validity of the Act of 1868 been sustained by the Supreme Court of the State of Missouri. For many years the city has acquiesced in its decision. For seven years after the alleged expiration of its charter, the Laclede Company has been suffered to do within the limits of the city what it had the power to do under the act of 1868 alone. The city has even made and is now performing on its part, a contract with the company for lighting certain of its streets and alleys by electricity. These things have been done since the decisions referred to were rendered, and after the City Counselor, its chief law officer, had in an official opinion advised it with respect to the status and rights of the Laclede Company. We venture to quote from this official opinion because the lawyer who wrote it was counsel for the city in all the cases referred to, and therefore was familiar with all of the questions raised.

"The question whether the act of March 26, 1868, is unconstitutional upon the ground that it does not conform to section 25 of Art. IV. of the constitution of 1865, *has been decided by the Supreme Court in the negative.* * * * I am constrained to say, in answer to question four, that the chartered life of the Laclede Gas Light Company will under the above enactments continue forever." Official Opinion, City Counselor Bell, Dec. 30, 1880.

Notwithstanding the considerations referred to, it is again urged by the city that the act of 1868 is invalid. An effort is made to evade the decisions of the Supreme Court upon the plea that what has been heretofore said with respect to the validity of said act is *obiter dictum* and without full consideration of the objections urged against it. Yet it cannot be denied that in all of the cases cited the validity of the act of 1868 was necessarily involved. In two of them its validity was expressly affirmed. We might therefore dismiss without further notice, the various objections raised, relying upon the former judgments of the Supreme Court of Missouri.

That Court has repeatedly decided that the

"Plea of res adjudicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time." — Chouteau *v.* Gibson, 76 Mo. 64.

Assuming, therefore, that the validity of the act of 1868 had not been raised in the cases referred to, yet upon the principle invoked, as between the parties its validity has been established because necessarily involved. But in

point of fact the constitutionality of said act was questioned in all of said cases. An examination of the record in the case first decided (City *v.* Gas Co., 70 Mo. 120), shows that the Court below adjudged the act to be invalid as being in conflict with section 1 of article VIII. of the constitution of 1865. In his opinion the judge said:—

> "The constitution (1865, Art. VIII., sec. 1) provides that no act can be revived or re-enacted by mere reference to the title thereof, but in every such case the act revived must be set forth and published at length as if it were an original act. * * * The act of 1868 violates this provision."—Opinion of Gottscholk, p. 8.

Moreover, it appears by the brief of counsel for the city in said case, now on file in the office of the clerk of the Supreme Court of Missouri, that it was urged that the act of 1868

> "was inoperative because it conflicts with section 25 of article IV. of the constitution of 1865 then in force, which provides that no act shall be revived or re-enacted by mere reference to the title thereof * * * but in every such case the act revived or re-enacted, or the part of the act amended shall be set forth and published at length, etc."—Brief of City Counselor Bell, p. 16.

It is true that it does not appear by the published decisions of the Supreme Court delivered in the first two of the cases cited, that the constitutionality of the act was discussed or expressly decided, but that court has recently declared that where a question is discussed and decided in a lower court and is necessarily involved, the judgment of the Supreme Court affirming or reversing the judgment below *implies a ruling on the question.*

Hanna *v.* South St. I. Land Co., 126 Mo. 1 & 10 (1894).

That the act of 1868 was considered and passed upon in the case of the City *v.* the Laclede Gas Light Company (102 Mo. 479, 480, 483 — 1890) appears upon the face of its judgment and is recorded in its published opinions.

In view of the foregoing considerations, we submit with the utmost confidence that this Court would not hesitate to follow the previous adjudications of the Supreme Court of Missouri, whatever the present opinion of that court may be with respect to said act. No opinion is, however, expressed upon this point by the court below. It "assumes, not decides" that plaintiff is "an existing corporation possessing all the powers, rights and privileges its charter purports to confer upon it." (Trans., pg. 41.)

It is perhaps supererogation to again discuss the validity of the act of 1868 as if it were res integra, but counsel for defendants urges with such manifest sincerity that said act o ght now to be disregarded, that a brief discussion of the constitutional provisions invoked may not be omitted.

Sec. 1, Art. VIII. Const. of Mo. 1865. Section 1 of Article VIII. of the constitution of 1865 provides

> "that no act shall be passed *reviving or re-enacting* any act heretofore passed creating any private corporation, where such corporation shall not have been organized and have commenced the transaction of its business within one year from the time such act took effect, or within such other time as may have been prescribed by such act for such organization and commencement of business."

The act of 1868 is entitled "an act to amend an act to incorporate the Laclede Gas Light Company, approved March 2, 1857." It does not purport in terms to *revive or re-enact* the act of 1857. The record shows, however, that

in 1868 the Laclede Company had not "commenced the transaction of its business," and it is contended that the effect of this omission was to terminate the existence of the corporation either after one year from the date of its charter, or at the time of the adoption of the constitution; so that the legislature might not thereafter, even under color of an amendatory act, revive its powers and privileges.

The answer to this argument is as follows: When the act of 1857 was passed, Sec. 6, p. 371 of the Revised Statutes of Mo. 1855, provided that

> "if any corporation hereafter created shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

The 8th section of the act of 1857, however, expressly exempted the Laclede Company, from the operation of this law. The company, therefore, was by the express terms of its charter, authorized to commence business at any time within its corporate life. The reason for this exemption is obvious if the exclusive privileges conferred by the act or 1839 upon the St. Louis Gas Light Company be borne in mind. Until the expiration of these exclusive privileges, (i. e., until 1890) the Laclede Company was disabled from doing business, and was in the meantime exempted from the operation of the general law. It did, however, organize within the year (Trans., pg. 47). It appears, therefore, that at the time of the adoption of the constitution of 1865, the charter was in full force and effect. The constitution does not purport to repeal it. It prohibits the *revival* of corporations which had not commenced business within one year *or* the time prescribed by their charters. The plaintiff's charter allowed the company, as we have seen, to commence business at any time

within its corporate life. This is the undoubted object and effect of the section which exempts the company from the obligation to begin business within one year imposed by the general law on all other companies, and is the only construction reconcilable with the exclusive privileges theretofore conferred upon the St. Louis Gas Company.

If it had been the purpose of the framers of the constitution to thereby repeal the charter of plaintiff, the constitution of the United States precludes such a consummation. The general law of 1855 provided that all charters thereafter granted by the legislature should be "subject to alteration, suspension and repeal in the discretion of the legislature" (Sec. 7, p. 371, Vol. I. Revised Statutes 1855; act approved Nov. 23, 1855). The 8th section of plaintiff's charter expressly exempted the company from the operation of the general law, and thereby signified its will that said charter should be unalterable and unrepealable. The constitution itself was powerless, under such circumstances, to repeal it, even if it had been the design of its framers to do so.

Fisk *v.* Police Jury, 116 U. S. 131;
Water Works Co. *v.* N. O. Co., 120 U. S. 64.

Assuming for the foregoing reasons, the existence of the corporation in 1868, the act of that date could not in the nature of things *revive* or *re-enact* what was already alive and in full force. The act of 1868 must be held to be what it purports to be, an amendatory act. With respect to the propriety of such legislation, under the constitutional provision quoted, there can be no doubt.

> "The prohibition against reviving charters implies that the charter to be revived is lifeless. * * * While the constitution prohibits the creation of private corporations by special laws and contains other

restrictions against special legislation, still it was held by this court that the legislature could by a special act *amend* special charters previously existing."—R. R. Co. *v.* Shambaugh, 106 Mo. 568–9 (1891).

Sec. 25 of Art. IV. of the Const. of 1865.

"No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the part of the act amended shall be set forth and published at full length, as if it were an original act or provision."

The second objection urged against the act of 1868 is that it violates the foregoing constitutional provision, in that it revives or re-enacts the act of 1857, by mere reference to the title thereof, and amends said act by striking out particular parts of it and inserting other provisions in lieu thereof, without setting forth and publishing the parts of the act amended.

With respect to so much of this objection as rests upon the presumption that an act to *amend* is an act to *revive*, nothing need be said in addition to what was said under Sec. 1 of Art. VIII.

The argument that the act of 1868 falls within the prohibition of Sec. 25, Art. IV., because its *effect* is to modify the act amended, is entitled to little consideration. The constitution prohibits amendments to be made *in a particular manner*, that is,

"*by providing* that designated words be stricken out, or that designated words be stricken out and others inserted in lieu thereof; *in every such case* the act amended"

must be set forth, etc.

The act of 1868 *does not provide* that *designated words* of the act of 1857 be stricken out, or that any other words be inserted in lieu thereof. It is not therefore "*such a case*" or kind of amendment as the constitution prohibits. It does not fall within the letter of the provision invoked.

Is this, or is any court at liberty to enlarge the scope of the instrument in furtherance of a presumed object, so that it shall inhibit not only the special class of amendments described, but also all amendments whatever which in the opinion of the court involve the inconveniences or dangers against which the provisions was directed?

It is a familiar rule of constitutional interpretation that

> "No legislative enactment should be declared unconstitutional unless it appears very clearly so, and every reasonable intendment should be made to sustain it."

Fletcher *v.* Peck, 6 Cranch, 128;
Pine Grove *v.* Tolcat, 86 U. S. 667;
Stephen *v.* Block, 43 Mo. 390;
State *v.* R. R. Co., 43 Mo. 471;
State *v.* Pond, 93 Mo. 618;
State *v.* Burgdoerfer, 107 Mo. 1;
Deal *v.* Miss. Co., 107 Mo. 468.

It has been repeatedly declared that courts are not at liberty to usurp the prerogative of the people and add to or detract from the plain meaning of the instrument, however desirable in its opinion such a charge may be.

Spencer *v.* State, 2 Ind. 76;
People *v.* Purdy, 2 Hill, 35;
Newell *v.* People, 7 N. Y. 97;
Sturgis *v.* Crownenshield, 4 Wheat. 202;

U. S. *v.* Fisher, 2 Cranch, 399;
Warren *v.* Paving Co., 216 Mo. 577;
R. R. Co. *v.* Maguire, 49 Mo. 502.

Tried by these familiar rules, the constitutionality of the act of 1868 plainly appears. It does not fall within the letter nor expressed meaning of the instrument, and must therefore be upheld. How radical is the alteration of the instrument contended for, is manifest if we compare the provision under consideration with the provision adopted by other States upon the same subject.

MISSOURI CONST., 1865, ART. 4, SEC. 25.

"Nor shall any act be amended by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case the act or part of the act amended shall be set forth and published at length as if it were an original act or provision."

OHIO CONST., 1851, ART. 2, SEC. 16.

"No law shall be revised or amended, unless the new act contain the entire act revised or the sections amended."

INDIANA CONST., 1851, ART. 4, SEC. 21.

"No act shall be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length."

To so construe the Missouri constitution as to have it prohibit not only the special class of amendments mentioned, *but all others*, is to give it precisely the effect of the provisions adopted by other States, notwithstanding the obviously broader scope and the peculiar phraseology of these instruments.

Our own Supreme Court has repeatedly decided *with respect to this very section*, that such an interpretation cannot be allowed.

> "Counsel urge that this mode of accomplishing amendments is just as much within the prohibition of the constitution as if designated words had been struck out

and others inserted in lieu thereof. It is greatly to be regretted that our constitution did not adopt the same terms and language that we find in other States; but we must construe the law as we find it."

Boonville *v.* Trigg, 46 Mo. 289 (1870).

"The constitution is silent upon the question of implied repeals; and whether or not, as so elaborately argued by counsel, the same evil results from allowing such repeals as those specially provided against in that instrument, we cannot create a new prohibition, or give to the present one a scope beyond its import, and beyond the construction universally given it.

State ex rel. Maguire *v.* Draper, 47 Mo. 33.

"The object of this section (25 of Art. IV. of the constitution of 1865) is sufficiently stated in Morrison *v.* R. R. Co., 96 Mo. 602. It is there shown that when an act undertakes to amend a former statute, it is not sufficient to say certain words are stricken out, or certain words are inserted, but the section as amended must be set out in full, and this is all that is required. Here it is true that portions of the special act creating the school corporation are repealed or modified by the act of March 3, 1887, and the last named act does not name the sections which are thereby repealed, nor are the sections thereby modified set out in their modified forms. *This may lead to inconvenience in requiring a comparison of the old and new law, but such legislation is not prohibited by the provision of the constitution before quoted.* * * * *This act does not seek to amend any former law by simply striking out designated words or by inserting certain words, or by striking out words and inserting others in lieu thereof, and is not within the constitutional prohibition.*"

State *v.* Miller, 100 Mo. 446 (1890);
State *v.* Bennett, 102 Mo. 356 (1891).

Besides the foregoing considerations, which are suffi-

ciently conclusive, there are, as we have shown, three adjudications of the Supreme Court of Missouri wherein the validity of the very act under discussion was attacked upon the very grounds now again urged against it, and was unanimously sustained.

City *v.* Gas Co., 70 Mo. 120;
Gas Co. *v.* City, 86 Mo. 500;
State *v.* Laclede Gas Co., 102 Mo. 483.

Under such circumstances it is futile to further discuss the question. The act of 1868 cannot be avoided without disregard of fundamental rules of constitutional construction; of numerous cases applying such rules to the provision invoked; and of three cases, two of them between the parties now before the Court, wherein the precise law under consideration was attacked upon the precise ground now urged, and was sustained.

Assuming, therefore, that the act of 1868 is a valid enactment, it remains to construe its terms, for the purpose of ascertaining whether it confers the rights which this Court is asked to protect.

III.

CONSTRUCTION OF CHARTER. See *ante* pg. 11.

Duration of Charter. It was contended below by counsel for defendants in error, that the charter of the plaintiff expired on the 2d day of March, 1887, and that therefore it now has no right to exercise the rights conferred. This contention is based upon the following facts and assumption. The act of 1857 conferred upon the Laclede Company the powers and privileges enumerated until March 2, 1887) (Secs. 5 and 9) and provided (Sec. 6) that, if the City of St. Louis failed to purchase its works twenty years after

the company's organization, said powers and privileges should survive for a further period of thirty years; or until March 2, 1917. The act of 1868 repealed the 6th section of the Act of 1857 and thereby deprived the company of the contingent life of thirty years which it confers. It is true that the act of 1868 expressly confers *forever* the powers and privileges originally conferred for a definite period only, but, it is assumed by defendants, the effect of the amendment is not to prolong the life or powers of the company.

The strength, or rather weakness of this position depends upon the meaning of the word *forever*, in the act of 1868. If it means nothing, then it is true that the plaintiff's powers ceased March 2, 1887. If on the other hand it means "perpetually," "in everlasting continuance," "eternally," "through all ages," etc., which is the usual meaning of the word given in standard dictionaries, such as Webster and the Century, then the powers and privileges enumerated may now and for an indefinite period hereafter, be held, exercised and enjoyed by plaintiff.

It is unnecessary to discuss so manifest a proposition as that the word *forever* in the act of 1868 must be allowed some force and effect, or to attempt to show that in the absence of paramount considerations, it should be allowed its ordinary meaning. What are the considerations which should induce this Court to eliminate *forever* from the act, or give it an extraordinary meaning which would deprive it of all significance?

Upon this point the following argument was made below, and is, perhaps, as ingenious as any that can be devised.

The first section of the act of 1857 confers "perpetual succession" upon the Laclede Company. The 5th section confers the powers and privileges enumerated "during the continuance of this act." The 9th section provides that the act "shall continue in force" for thirty years. Al-

though the act of 1868 provides that the company may enjoy *forever* the powers, privileges, etc., conferred by the 5th section aforesaid, it does not in terms repeal the 9th section which restricts the life of the company to thirty years. The significance of this omission is found in the fact that another section of the act of 1857, to wit, Sec. 6, was expressly repealed. Why, it is suggested, did the legislature omit to repeal section 9, when it repealed section 6, if it had intended to repeal *both* sections? If for the foregoing reason section 9 be confessed to be still in force, then a meaning must be given to the word *forever* which is reconcilable with the thirty years of said section. It is no more difficult to reconcile *forever* with *thirty years*, than the *perpetual succession*, with which it is synonymous, conferred by the first section of the act of 1857, yet confessedly the act of 1857 did not confer more than thirty years of life. It is therefore concluded that the life of the company expired March 2, 1887.

A sufficient answer may be made to this argument by reversing the order of the acts under consideration. Let it be assumed that the first section of the act of 1857 conferred perpetual succession upon the company; that the 5th provided that the company should enjoy the powers enumerated *during the continuance* of the act; that the 9th section provided that the act should *continue in force forever;* and that the act of 1868 had amended the 5th section of the act of 1857, by providing that the corporation should enjoy the rights and powers therein conferred for *thirty years* only, and by repealing the 6th section. Under such circumstances it might with equal propriety be argued that the omission of the legislature to repeal the 9th section is significant. Why did it expressly repeal section 6 and omit to repeal section 9 if it had intended to repeal *both* sections? Yet if section 9 be confessed to be still in force, then some meaning must be given to thirty years which is

reconcilable with the *forever* of said section. Therefore an act which, under such circumstances, by way of amendment restricts to thirty years the life of a corporation theretofore chartered to exist forever, does not abridge the life of the company. That such a conclusion is repugnant to common sense goes without saying. It is not less so than the conclusion that an amendment which confers *forever* powers theretofore conferred for thirty years only does not prolong the life of the company.

If there existed any reasonable ground for doubt with respect to the purpose of the legislature when it passed the act of 1868, the circumstances under which it was passed would remove it. The charter of the St. Louis Gas Light Company, already referred to, conferred upon it the exclusive right to manufacture and vend gas within the city until 1890. In 1868 the Laclede Company was therefore in a peculiar predicament. It could not prosecute its business until the expiration of said privileges and in the meantime its life might (1877), be terminated by the city (Sec. 6, act of 1857). To afford, under such circumstances, an inducement to the company to preserve its organization and prepare for the ultimate prosecution of business, was the undoubted object of the act of 1868. The right of the city to purchase the company's property was expressly repealed, and its life was extended *forever* for this purpose and no other.

It is difficult to now realize that thirty years ago the business of gas making might not have been deemed profitable. The risks of the business and the enormous outlay required for its prosecution were, however, clearly perceived. At one time it seems to have been doubtful whether any company could be induced to provide gas for certain districts of the city. In 1859 the legislature of Missouri passed an act entitled "An Act to authorize and encourage the extension of gas works in St. Louis," which

provided that the corporation which "should first extend and lay pipes to furnish gas to any part of said city now destitute of gas shall be protected in the enjoyment of such gas pipes and fixtures of all kinds whatsoever, any law, usage or custom to the contrary notwithstanding," etc. Session Acts, 1859–60, pg. 528.

This act is not more distinctly an evidence of the disposition of the legislature to make provision for the lighting of the whole city, than the act of 1868. The latter act is obviously friendly to the Laclede Company.

It —

greatly enlarges the powers of the company;
extends the territory within which its operations may be carried on;
authorizes the stock of the company to be increased from time to time to such an amount as might be necessary;
repeals the city's right of purchase; and
provides that it may have, hold, exercise and enjoy the powers conferred *forever*.

If any regard be had for the remarkable provisions of this act or the peculiar predicament of the company due to the exclusive privileges of the St. Louis Gas Light Company, the conclusion is irresistible, that the legislature intended to prolong the life of the company, so that it might be enabled, upon the expiration of such privileges, to supply the city and its inhabitants with light. The letter as well as the manifest spirit and purpose of the act of 1868 therefore require that due force should be given to the word *forever*.

How unreasonable, under the circumstances described, is the construction contended for by defendants, appears if the effect of the repeal of the 6th section of the act of 1857 be considered. That section gave to the Laclede Company the right to carry on business within a certain part of the

city until 1917, if the city omitted to purchase its works in 1877.

The repeal of this section by the act of 1868 deprived the company of any possibility of life after 1887 if the word forever is to be ignored. In the meantime it was disabled from doing business without the consent of the St. Louis Company. That the legislature was well aware of this fact appears from the provisions of the third section of the act of 1868, which expressly protects the rights of said company from invasion. It is hardly necessary to urge upon the Court that under such circumstances the intent of the legislature to confer upon plaintiff *forever* the privileges mentioned, is manifest and should be regarded.

In addition to the foregoing considerations, which in our opinion constrain the conclusion we contend for, there are two of paramount influence. In a recent case the Supreme Court of Missouri, while deciding that the words "perpetual succession" in a charter did not necessarily confer perpetual life upon a corporation, holds also that if these words had been accompanied by others, such as *forever*, their conclusion would have been otherwise.

State ex rel. *v.* Payne, 31 S. W. Rep. 797; following State *v.* Stormont, 24 Kansas, 686.

In the case of the State ex rel. the City of St. Louis *v.* the Laclede Gas Light Company, already alluded to (102 Mo. 479) the same court expressly decided *that in 1890*, three years *after the alleged expiration of its charter*, the plaintiff had *under the act of 1868*, the right to vend gas, etc., throughout the limits of the city, independently of any city franchise. The import and necessary effect of this decision is to establish for all time the perpetuity of plaintiff's charter. In the opinion of the city counselor the prior cases between the gas companies and the city had the same effect (*ante*, p. 21).

What follows is predicated upon the assumption that this Court will hold that the act of 1868 is a valid enactment, and that it confers the rights, powers and privileges enumerated *forever*. It remains to determine

1st. Whether the right to sell electric light and lay down in the streets pipes or conduits for that purpose is among the privileges conferred.

2d. Whether the ordinance complained of is a proper police regulation, or an improper impairment of the charter rights of plaintiff.

Right to Sell Electric Light and Lay Conduits. The language of the charter is as broad as any that could have been devised for the purpose of giving to the plaintiff the right to use any means of lighting that might at any time in the progress of invention be discovered (Trans., pp. 5 and 7).

> "The said company, its successors and assigns, shall have and enjoy (forever) the sole and exclusive (abandoned by the tripartite agreement privilege of lighting the whole city of St. Louis as its limits now are or may hereafter be established, and of making and vending *gas, gas lights and gas fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor*, and to that end *may establish and lay down* in said corporate limits *all pipes, fixtures or other thing* properly required in order to do the same (the same to be done with as much despatch and as little inconvenience to thepublic as possible) and shall have all other powers necessary to execute and carry out the privileges and powers hereby granted." Sec. 5, act 1857, as amended by the act of 1868.

No one will have the temerity to assert that it was the purpose of the legislature to restrict the company to the business of selling "gas, gas lights and gas fixtures," in view of the fact that it is also authorized to make and

vend *any substance or material* that might then or thereafter be used *as a substitute* for gas, gas lights and gas fixtures. It is alleged in the answer to defendant's return, and admitted by the demurrer, that long before March 2, 1857, "electricity had been used for illuminating purposes and apparatus had been devised and publicly exhibited to great numbers of persons, by means of which solid bodies could be made incandescent by electric currents, so as to produce light for purposes of illumination." If it be assumed that the strictest interpretation will be given to the charter in furtherance of the public interest, and that nothing will be implied by the Court in favor of the plaintiff, yet it is the duty of the Court to respect the language of an act and withhold nothing which the legislature has plainly intended to confer. Electricity is a substance now used as a substitute for gas; and an electric light, which is carbon rendered incandescent by an electric current, is a material now used as a substitute for gas lights, or carbon rendered incandescent by combustion. Of these things the Court will take judicial notice. They are matters of common knowledge within the constant daily experience of every member of the Court.

Brown *v.* Piper, 91 U. S. 37;
State *v.* Hayes, 78 Mo. 318;
Wolfe *v.* R. R., 97 Mo. 481.

What pretext can be found for excluding from the scope of the grant objects so manifestly within its letter and purpose? The State created a lighting corporation and authorized it not only to make and vend gas and gas lights in the prosecution of its business, but any substance or material that might *at any time* be used as a substitute for either of them. Electric lighting, although then in its infancy, was well known, as the demurrer admits. Who

can say that the legislature did not intend, by the very broad terms of the act, to include such a mode of lighting? The Court cannot deprive the company of the right to vend electric lights without disregarding at least *seventeen words* of the act. No rule of interpretation justifies so flagrant a departure from its manifest meaning. The objections most strenuously urged below relate to the policy, not to the terms of the grant. They are out of place in a court of justice. With the legislature alone rests the power and responsibility of making laws. It is the function of the court to construe — not to reform or revise laws (State *v.* Pond, 93 Mo. 618). Much might be said however in justification of the policy of the legislature. The plaintiff long ago surrendered all claims of exclusive privilege (Trans., p. 7). It is for the public interest that there should be competition in the public service. There are now operating in St. Louis many other corporations engaged in the business of electric lighting. The General Statutes of the State expressly authorize the formation of companies for such purpose (Gen. Stats. 1889, Sec. 2793). Until very recently the ordinances of the city permitted any one to use its streets for the purpose of vending electricity, who would agree to pay five per cent of his gross receipts for the privilege (Art. 2, Chap. 15, Rev. Ords. 1887). The right and power of the State in 1857 and 1868 to control the use of the streets of St. Louis is expressly conceded by the Supreme Court of Missouri (Trans., p. 41). It rested therefore with the legislature to determine upon what conditions such streets might be used for the purpose of gas or any other mode of lighting. The fierce attack now directed against the extent of the grant made, is not in reality predicated upon the construction contended for, but upon the damage done to the municipality by the failure of the legislature to charge upon the company a burden for the city's advantage. The ques-

tion whether in 1868 the corporation would have accepted a charter allowing the city to tax not only the property, but the franchise of the company, is entirely ignored. The legislature did not see fit to impose such a condition, and there is an end of it,— if this Court still adhere to the doctrine that contracts with the State are equally with other contracts protected by the constitution of the United States.

The argument made with respect to the construction of the act is disingenuous. For many years the city has conceded the power of the company to make and vend electricity. It has in fact availed itself of the instrumentalities of the company for lighting its streets by electric lamps, and now uses such instrumentalities. The petition alleges and the answer admits, that there is now in full force a contract made many years ago whereby, for considerations named, the company has undertaken to furnish electric lights for a large district of the city, and that the company is now engaged in performing the obligations thereby assumed. Under such circumstances the city is committed to the construction of the charter we contend for. Its present attack is an argument drawn from the inconvenience of the grant made, and not from rules whereby charters are to be construed.

If it be assumed that the charter of plaintiff confers upon it the right to make and vend electric light as a substitute for gas light, it follows that the company may lay down in the streets "any pipe, fixture or thing necessary or proper" for that purpose, with one proviso: that it do so "with as much dispatch and as little inconvenience to the public as possible."

The company now proposes, in response to a public demand for the removal of overhead wires, to do what it can to obviate the manifest dangers and inconveniences of such

a system, by placing its wires underground, "in an approved and practical method, and with as much dispatch and as little inconvenience to the public as possible." The city refuses to allow it to proceed and charges among other things that the present ordinances of the city prohibit what is proposed.

IV.

Validity of the City Ordinances.

ARTICLE II, CHAPTER 15,

of the Revised Ordinance of the City of St. Louis, 1887 (as amended by Ordinance No. 16894).

Sec. 581. That no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the City of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred and twenty-three, now amended, or shall be duly authorized by the Municipal Assembly and then only as hereinafter provided.

Sec. 582. All such wires, tubes or cables, along or across any of the streets, alleys or public places of the City of St. Louis, shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the Board of Public Improvements.

Sec. 583. That any person or persons, corporation or association duly authorized by ordinance to do business in the City of St. Louis, and desiring to place along or across any of the streets, alleys or public places of the City of St. Louis, such wires, tubes or cables, shall file in the office of the Board of Public Improvements an application therefor, stating in detail the street, alleys or public places which said wires, tubes or cables are to occupy, and in the manner in which said wires, tubes or cables are to be

secured or supported and insulated, together with a plat, showing the route of such wires, tubes or cables.

Sec. 584. The Board of Public Improvements is hereby authorized upon the filing of the application and plat required by the preceding section to grant a permit for such occupancy of the streets, alleys and public places therein named, with such restrictions, regulations and qualifications as may be prescribed by said Board, and under the supervision and to the satisfaction of the Supervisor of City Lighting.

Sec. 585. Poles.

Sec. 586. Poles.

Sec. 587. Poles.

Sec. 588. Any person or persons, corporation or association having made excavations in the streets, alleys or public places in the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public improvements, and to the satisfaction of the street commissioner.

Sec. 589. Overhead Wires.

Sec. 590. No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article except on the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing said statement with the comptroller, pay into the city treasury two and one-half per cent on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent on the amount of gross receipts thereafter. And said person or

persons or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance for the purposes herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article.

Sec. 591. Any person or persons, corporation or assot ciation which, or any president, manager, superintenden- or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars nor more than five hundred dollars.

Sec. 592. The city reserves the right to alter, amend or repeal this article at any time.

Trans., pg. 52.

It is contended by the defendant that the foregoing ordinance is a valid exercise of the police power conferred upon the city by its charter, and this view was adopted by the Supreme Court of Missouri. On the other hand, the plaintiff insists that the ordinance is not a proper police regulation because —

1st. It delegates to the Board of Public Improvements the regulation of the business of electric lighting, whereas

the charter of the city confers upon the Municipal Assembly alone the power to adopt such regulations.

2d. It exacts from the plaintiff a tax of five per cent upon the gross receipts derived from its business, and to that extent impairs the obligation of its contract with the State.

3d. It does not purport to regulate but to wholly prohibit the exercise by plaintiff of the powers and privileges conferred by its charter, and thereby impairs the obligation of said contract.

Ordinance void because it delegates to the B. P. I. the power to make regulations. Assuming, for the moment, that the ordinance under consideration is an attempt to regulate the placing of wires under ground, and that by compliance with the regulations prescribed by the Board of Public Improvements we might obtain a permit to excavate the streets (which is not the case), there remains the question whether the ordinance is a valid exercise of the power conferred by law upon the Municipal Assembly of St. Louis.

Par. 2, Sec. 26, Art. III. of the charter of the city (Rev. Ords. 1892, p. 366), provides that the *Mayor and Municipal Assembly* shall have power *by "ordinance to regulate the use of the streets," etc.* The ordinance under consideration delegates this power to the Board of Public Improvements. It has been repeatedly decided by the Supreme Court of Missouri that a power conferred by a charter upon the legislative authorities of a city cannot be delegated.

> "Municipal powers may be delegated; legislative powers can not. The latter imply judgment and discretion on the part of those who execute them, and a special confidence and trust on the part of those who confer them."

Accordingly it has been held that where the law confers upon the legislative body of a city power to do so, it may not delegate

To the mayor authority to prescribe material for street paving.

Ruggles *v.* Collier, 43 Mo. 353.

To the city engineer authority to determine dimensions of public sewers.

St. Louis *v.* Clemens, 43 Mo. 395;
Same case, 44 Mo. 19;
St. Louis *v.* Craemer, 52 Mo. 133.

To the mayor or another, authority to *prescribe manner in which* streets shall be macadamized.

Haegela *v.* Mallinkrodt, 46 Mo. 577.

To county clerk power to audit an account.

Saline Co. *v.* Wilson, 61 Mo. 237.

To committee authority to fix grade of street.

Thompson *v.* Booneville, 61 Mo. 282.

To mayor power to fix wharfage rates.

Mathews *v.* Alexandra, 68 Mo. 115.

To citizens authority to license livery stables.

St. Louis *v.* Russell, 116 Mo. 235.

To householders authority to license slaughter-houses.

City *v.* Howard, 119 Mo. 41.

To city engineer authority to prescribe materials for sewer.

City *v.* Wilshire, 47 Mo. App. 145.

To mayor authority to license peddlers.

Town *v.* Clayton, 50 Mo. App. 535.

To city engineer right to prescribe material for street paving.

King Hull Co. *v.* Hamilton, 51 Mo. App. 120.

That the regulation of the mode in which "wires, cables, tubes, etc., conveying electricity for light, heat and power," shall be placed underground involves the exercise of "judgment and discretion" goes without saying. Extreme differences of opinion have arisen with respect to the manner in which this much needed improvement should be made. Various cities have adopted various methods. Where many individuals are concerned and their conflicting interests are to be adjusted to the public convenience, the very nicest judgment and discretion is required. The City of St. Louis has delegated this very important and delicate function to a Board consisting of various heads of departments, in violation of the charter's requirement that the use of all streets shall be regulated by "*ordinance of the Mayor and Municipal Assembly.*"

The ordinance itself contains no regulation whatever except that wires shall be placed in alleys where practicable. It delegates to the Board of Public Improvements full power to determine the manner, time, material, safeguards, etc., which shall be observed. It enables that board to decide with respect to the relative rights and obligations of the various companies or persons having conflicting interests; how much of the street shall be occupied by one and how much by another; whether all wires shall be placed in a common conduit or in separate ducts; what precautions shall be taken against induction, fire, explosions and other consequences of improper insulation. It is hardly neces-

ary to argue that these questions involve the exercise of judgment and discretion of the highest and most impartial order.

For the foregoing reasons we insist that there were no valid municipal regulations in force when the plaintiff applied for permission to excavate the streets. No rules had in fact been promulgated, even by the Board of Public Improvements; and if such rules had been promulgated, the board was not at liberty to grant to plaintiff a permit, notwithstanding its expressed assent to, and offer to literally comply with such rules. The ordinance prohibited a permit except to such persons, associations or corporations as *had prior to 1892* assented to the provisions of the general ordinance, or been thereafter authorized by a special ordinance. Under such circumstances an application to the Board must necessarily have been futile. The plaintiff had not prior to 1892 assented to the general ordinance (for reasons hereafter stated) and the Municipal Assembly refused its subsequent assent. The Board could not therefore have issued a permit to plaintiff even if its plans had in all respects been approved.

We have perhaps been unnecessarily diffuse in the discussion of this branch of the case, but its immediate bearing upon the relief prayed for demanded an exhaustive consideration.

Plaintiff's charter distinctly confers upon it the right "to establish and lay down in any portion of the corporate limits of St. Louis" all pipes, fixtures *or other thing* properly required in order to do" the business for which it was created, with one proviso, to wit: that "the same shall be done with as much despatch and as little inconvenience to the public as possible." (Trans., p. 5.)

Assuming, for the reasons above stated, that there was no ordinance passed by the Mayor and Municipal Assembly within the meaning of the city's charter, regulating the

manner in which the pipes, fixtures or things should be laid, the plaintiff is bound to observe the mode pointed out by its charter only, and this it has offered to do. The petition alleges that plaintiff

> "in order to provide a more effective service, has made arrangements to lay its wires underground according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible." (Trans., p. 8.)

2d.

Ordinance void because it exacts five per cent tax on gross receipts. That a corporation's charter which is in terms unalterable and irreparable is an inviolable contract within the meaning of the constitution of the United States, cannot now be controverted.

> Dartmouth College case, 4 Wheat. 518;
> Louisville Gas Co. *v.* Gas Co., 115 U. S. 683;
> N. O. Gas Co. *v.* Light Co., 115 U. S. 650;
> M. & O. R. R. Co. *v.* Tennessee, 153 U. S. 486;
> State *v.* Laclede Gas Light Co., 102 Mo. 472.

It seems equally obvious that a law which exacts a percentage of the gross receipts of a company, in addition to the ordinary taxes assessed upon its property, impairs the rights conferred. If not, then the city may exact ten, twenty or fifty per cent of such receipts and indirectly prevent the exercise of such rights. Where a right or privilege is conferred by a charter, what impairs the value of the privilege, impairs the obligation of the contract. The tax under consideration cannot be regarded as a police regulation.

> "A police regulation must have reference to the comfort, welfare or safety of society; it must not be

in conflict with any provision of the charter, and must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, it must be a police regulation in fact and not an amendment of the charter in curtailment of the corporate franchise."

Cooley Const. Lims., 5th ed., 712;
State *v.* Laclede Co., 102 Mo. 486;
Rushville *v.* Gas Co., 15 L. R. A. 321; 132 Ind. 575;
Mayor *v.* R. R. Co., 32 N. Y. 261.

3d.

Ordinance void because it wholly prohibits what charter authorizes. For reasons already set forth, we deny that the ordinance under consideration is a regulation. It does not regulate: it prohibits. Not even the Court below could escape this conclusion. It therefore frankly holds that although the ordinance "wholly prohibits" the undergrounding of wires, it is still valid because the plaintiff is now being permitted to use the streets "in the method now in use in the city." That the ordinance does not admit of this construction is clear upon an examination of its terms. It does not purport to discriminate between overhead and underground wires. *Both methods* of distribution are expressly allowed under the conditions prescribed.

Section 581 as amended provides that

> "*No wires, tubes or cables* conveying electricity shall hereafter be placed *along or across* any of the streets, alleys or public places of the city by any person, corporation or association"

who had not prior to October, 1892, accepted and complied with the general ordinance of 1887 or been authorized by a special ordinance of the Municipal Assembly.

Section 582 provides that

> "All such wires, tubes or cables along or across any of the streets, etc., shall be placed at such distance *above or below* the surface of the ground, and secured in such manner as shall be prescribed by the Board of Public Improvements." *Ante*, p. 40.

Not one word is said which warrants the conclusion that the Municipal Assembly intended to prohibit the undergrounding of wires by a person who maintained an overhead system. On the contrary, it expressly appears by the ordinance that *either or both* methods of distribution may be adopted by *any licensee* of the city who *will agree to pay the five per cent tax*. Neither method is allowed to plaintiff because it has not the city's consent and has not agreed to pay the tax. If the ingenious suggestion of the Court below be adopted by this Court, it will have the effect of validating the *conditions prescribed* by the ordinance. In other words, if only such persons as have permission from the city and will agree to pay five per cent of their gross receipts are allowed to use both overhead and underground methods of distribution, then the fact that plaintiff has not such permission and has not agreed to pay the five per cent tax is the sole reason why it is prevented from going under ground.

It appears upon an analysis of the ordinance that it prohibits any person from stringing wires along or across the streets, unless such person:—

1st, had prior to October 26, 1892, accepted and complied with the provisions of Art. II, of Chapter 15 of the Revised Ordinances, or shall be duly authorized by the Municipal Assembly; nor unless he shall

2d, file in the office of the Board of Public Improvements an application for a permit stating in detail, and

showing by plat, the streets to be occupied, and the manner in which the wires, cables, etc., shall be secured; nor unless he shall

3d, obtain a permit from said Board containing such restrictions and regulations as it may prescribe; nor unless he shall

4th, file with the City Register his acceptance of all the terms of the general ordinance, and agree in writing to file with the Comptroller of the city on the first days of January and July of each year a statement of his gross receipts from the business of supplying electricity for light and power for the preceding months, verified by affidavit; nor unless he shall agree

5th, that he will at the time of filing such statement pay into the city treasury five per cent on the amount of such gross receipts; nor unless he shall

6th, file with the City Register his penal bond in the sum of $20,000 with two sureties, to be approved by the Mayor, conditioned that he will comply with all the regulations of the Board of Public Improvements, make the statements and payment required as above, and save the city harmless from all damages by reason of the exercise of the privileges conferred (Trans., p. 52).

That such an ordinance is not a police regulation goes without saying. It is a revenue law. Its object is not to preclude a person from using both methods, but to *allow both methods* on payment of the tax, and exclude *either* method without payment of the tax. If the plaintiff had applied for permission to string an *overhead* wire and excavate a street for such purpose, the city might within the interpretation put upon the ordinance by the Supreme Court of Missouri, have refused to permit on the ground that the ordinance allowed the undergrounding of wires and that therefore the other method was precluded except under

the condition prescribed. The city has in fact refused a permit to plaintiff for either system, and that it was the purpose of the ordinance to justify such refusal does not admit of question. To give effect to the conditions prescribed is not therefore to secure proper methods of distribution or confine the company to one of two methods, but to preclude it from doing what all other persons, corporations and associations are permitted to do who will pay the tax and procure the consent of the city.

If the plaintiff in error had submitted to the Board of Public Improvements, plats and specifications showing in detail the work to be done, and the board had in all respects approved such plans, etc., still under the ordinance it must have withheld a permit, for two sufficient reasons:—

First, because plaintiff had not a license from the city.

Second, because it had not agreed to pay five per cent of its gross receipts into the city treasury.

The sole question therefore, is, are the conditions prescribed by the ordinance valid with respect to the plaintiff. Whether an ordinance prohibiting any person who maintained an overhead system from placing wires underground, would have been valid, is not in any way involved in this controversy. No such ordinance has been adopted. This is the sufficient answer to the Court's suggestion.

It may perhaps be suggested that plaintiff should, with a view to laying the foundation for this action, have submitted its plans, etc., for the approval of the board, so that the effect of the judgment of the Court will not be to allow an improper or inconvenient method to be adopted. There are several answers to this suggestion. In the first place the city has never based its refusal to allow an excavation on such ground. The contrary appears from the return filed. In the second place, for reasons already fully

set forth, we have believed that the Municipal Assembly has not power, under the city's charter, to delegate legislative functions to the board. Lastly, the charter itself prescribes a sufficient regulation.

We have already discussed two of the conditions prescribed. That which requires the plaintiff to obey all regulations prescribed by the Board of Public Improvements is void because, under the charter of the city, the Mayor and Municipal Assembly must "*by ordinance*" regulate the use of the streets, and such a duty cannot be delegated. That which requires the payment of five per cent of gross receipts into the city's treasury is void because it impairs the value of the privileges conferred by plaintiff's charter, and to that extent impairs the obligation of its contract with the State.

The condition that the plaintiff shall not put wires under ground without the city's consent is directly violative of its charter. It prohibits plaintiff from doing what the charter says it may do. Section 5 of the act of 1857, as amended, provides that

> "the company may establish and lay down in any portion of the corporate limits of the city any pipe, fixture or thing properly required in order to light the city and make and vend gas, gas lights and gas fixtures, and any substance or material that may now or hereafter be used as a substitute therefor."

The ordinance, to quote the language of the Court below, "wholly prohibits" the laying of wires or tubes conveying electricity for the distribution of light in the streets, without the consent of the city. This consent the city has refused, as appears by the defendant's return. That such prohibition is void as impairing the obligation of plaintiff's charter does not admit of question.

Citizens R. R. Co. *v.* Memphis, 53 Fed. Rep. 732.

Conclusion. If it be adjudged by this Court that the acts incorporating the Laclede Gas Light Company are valid enactments within the meaning of the constitution of the State; that properly construed such acts now authorize said company to have, hold, exercise and enjoy the rights and privileges thereby conferred; that among such rights is the right to make and vend electricity or electric lights, as a substitute for gas and gas lights, and to establish and lay down in the streets of St. Louis pipes and fixtures properly required in order to carry on such business; and that the ordinance which prohibits the exercise of the privileges conferred is void because it impairs the obligation of plaintiff's contract with the State; then it follows that the judgment of the Court below should be reversed and this cause remanded with directions to make the writ of mandamus prayed for peremptory.

Section 35 of Article IV. of the Charter of St. Louis charges upon the Street Commissioner the duty of repairing, constructing, etc., the streets. Section 1335 of the Revised Ordinance 1892 (Sec. 1306 Revised Ords. 1887) provides that any corporation desiring to make an excavation in any improved public street for any purpose whatever shall apply to the Street Commissioner for a permit. The plaintiff made such application and a permit was denied. If the right to make the excavation be allowed, the duty of the Street Commissioner to issue a permit follows as a matter of course. To enforce this duty is the object of the present proceeding.

Before submitting the case, some reply ought perhaps to be made to the argument most strenuously urged below with respect to the consequence of a judgment in plaintiff's favor. If the writ prayed for is granted the city, suggested counsel for defendants in error, will be at the mercy of a pitiless monopoly. Its right to direct the mode in which its streets shall be used will be destroyed

Its power to protect public and private interests by the enforcement of proper regulations will be unavailing. All hope of revenue from the exercise of public privileges of enormous value will be annihilated. The Laclede Gas Company will have an absolute and independent right to appropriate so much of the public highways as its caprice or convenience may suggest. What it can not use, it may farm out to others, and thereby appropriate to itself a vast revenue from the use of public property. Public policy imperatively demands that such vast powers should not be confided to a private association.

The answer to this argument is obvious. If the State law confers such privileges, this Court must enforce it, however unwise, in its opinion, such an enactment may be. The people of Missouri intrusted to the legislature responsibilities which it alone could discharge. If it abused its powers, the confidence of the people was misplaced. No court can redress the wrong done.

No wrong has however been perpetrated. None of the vague fears of defendants have any foundation in law or fact.

Plaintiff has never refused to comply with any proper city regulations. The company complains not of any regulation, but of the refusal of the city to allow, under any circumstances, the exercise of its charter rights. If, as had been contemplated, plans and specifications had been filed with the Board of Public Improvements, for its approval, and an application for a permit predicated on such approval had been made, the Board could not, under the provisions of the ordinances in force, have granted such application. The Board is prohibited by the ordinance from issuing permits to any persons who have not the city's consent to string wires, and such consent has never been given to the plaintiff.

Nothwithstanding, therefore, any concession that the

company might make, short of surrendering forever and absolutely all rights under its charter, it could not obtain a permit. It has been compelled to resort to this proceeding. This is the true situation. That under such circumstances plaintiff ought to have redress is too plain to require argument.

One inconvenient consequence of establishing the plaintiff's charter to which counsel for defendants has repeatedly referred, ought not to be ignored by us. It is charged that plaintiff claims not only for itself the right to use the streets, but the right to farm out its privileges to others. No such claim of right is involved in this suit. The Supreme Court of Missouri has recently decided that public streets are held in trust for the benefit of the public, and that a law which authorizes another to lease or farm out any portion of the public property for his private benefit, violates said trust and is therefore void.

State ex rel. Underground Service Co. *v.* Murphy, 31 S. W. Rep.

We submit therefore that none of the alarming consequences forced upon the attention of the Court have any solid foundation in law or fact. The plaintiff is now competing with numerous other electric companies. It freely confesses the right of the city to regulate its operations. It never has exercised the right to sell or lease any part of its privileges. It comes into Court because it must. It asserts nothing but the right to do what its charter plainly authorizes it to do.

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